Walter a/l Pathrose Gomez & Ors v Sentul Raya Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S6–24–2072 OF 2003

ABDUL MALIK ISHAK J

26 SEPTEMBER 2005

Civil Procedure — Judgement and orders — Stay of execution — Application for stay pending appeal against judgment — Special circumstances — Meaning of — Whether filing of appeal constituted special circumatances — Effect of stay on parties if granted

Civil Procedure — Stay of execution of judgment — Stay of execution pending appeal — Special circumstances — Meaning of — Whether filing of appeal constituted special circumatances — Effect of stay on parties if granted

The plaintiffs bought condominium units from the defendant. Pursuant to the sale and purchase agreements ('SPA') entered into between the parties, the defendant was to hand over vacant possession of the condominium units and complete the common facilities within 36 months from the date of the SPA. Further, the defendant was to pay the plaintiffs liquidated damages in the event the defendant failed to deliver and complete the common facilities within the stipulated time period. The defendant failed to deliver and complete the common facilities within the stipulated time period. The plaintiffs commenced legal proceeding seeking, *inter alia*, liquidated damages in accordance to the SPA. The court ordered the defendant to pay the plaintiffs liquidated damages as per the terms of the SPA. The defendant appealed to the Court of Appeal and filed an application to the High Court for a stay of execution pending its appeal. In support of its application, the defendant argued that in the event the appeal was allowed at the Court of Appeal, the plaintiffs would not be in a position to repay the defendant due to their uncertain financial position. The defendant however failed to adduce any evidence in the affidavit to show the plaintiffs' alleged inability to pay.

Held, dismissing the application with costs:

(1) In a stay application, it is for the defendant to prove by way of affidavit evidence of the plaintiffs' poverty in that the payment of the judgment sums would destroy the substratum of the appeal (see para 24).

(2) 'Special circumstances' must be special under the circumstances as distinguished from ordinary circumstances. What was exceptional must have constituted special and what was special would surely be caught under the special circumstances requirement. It could not be something that was usual or common. Thus, the risk that the plaintiffs might not be

able to repay the defendant the sum set-off was common or usual. It was not special. It was not distinctive or out of the way and therefore it did not constitute special circumstances (see para 31).

(3) The filing of an appeal did not in itself constitute special circumstances so as to warrant a stay. In the instant case, to grant the stay would cause manifest injustice to the plaintiffs as there would be further delay while waiting for the hearing of the appeal at the Court of Appeal. Thus, the effect of the stay would not only prolong the disposal of the case but it would also cause anguish to the plaintiffs. The plaintiffs were entitled to the judgment sum and any delay in payment would cause prejudice to the plaintiffs who have waited for years for the completion of their condominium units and the liquidated ascertained damages pursuant to the SPAs (see paras 17 and 32).

[**Bahasa Malaysia summary**

Plaintif-plaintif membeli unit-unit kondominium daripada defendan. Menurut perjanjian jual beli ('SPA') yang ditandatangani oleh pihak-pihak, defendan hendaklah memberi milikan kosong unit kondominium tersebut dan menyudahkan kemudahan-kemudahan bersama dalam tempoh 36 bulan dari tarikh SPA. Selanjutnya, defendan hendaklah membayar kepada plaintif-plaintif gantirugi jumlah tertentu jika defendan gagal menyerahkan dan menyudahkan kemudahan-kemudahan bersama dalam tempoh yang telah diperuntukkan itu. Defendan telah gagal untuk menyerahkan dan menyudahkan kemudahan-kemudahan bersama dalam tempoh tersebut. Plaintif memulakan tindakan undang-undang memohon antara lain, ganti rugi jumlah tertentu menurut SPA. Mahkamah memerintahkan defendan membayar ganti rugi jumlah tertentu kepada plaintif–plaintif seperti mana terma-terma SPA. Defendan merayu ke Mahkamah Rayuan dan memfailkan satu permohonan ke Mahkamah Tinggi untuk penggantungan pelaksanaan penghakiman sementara menunggu rayuannya. Menyokong permohonannya, defendan menghujahkan bahawa jika rayuan dibenarkan oleh Mahkamah Rayuan, plaintif-plaintif tidak mempunyai kedudukan untuk membayar balik kepada defendan kerana kedudukan kewangan mereka tidak menentu. Defendan walau bagaimanapun gagal untuk mengemukakan sebarang keterangan di dalam afidavitnya menunjukkan ketidakmampuan plaintif untuk membayar.

Diputuskan, menolak permohonan itu dengan kos:

(1) Di dalam permohonan penggantungan, ianya adalah pada defendan untuk membuktikan melalui keterangan afidavit yang plaintif-plaintif tidak berkemampuan untuk membayar balik jumlah penghakiman dan ini menjadikan rayuan tidak bermakna (lihat perenggan 24).

(2) 'Keadaan-keadaan istimewa' mestilah istimewa dalam keadaan-keadaan tersebut dan dapat dibezakan dari keadaan-keadaan biasa. Apa yang luar biasa mestilah menjadi istimewa dan apa yang istimewa semestinya tergolong di dalam keperluan keadaan istimewa. Ia bukan sesuatu yang biasa atau umum. Oleh yang demikian, risiko bahawa plaintif-plaintif mungkin tidak dapat membayar balik jumlah penghakiman kepada defendan adalah sesuatu yang biasa atau umum. Ianya tidak tersendiri atau berbeza dan dari itu tidak tergolong di dalam keadaan-keadaan istimewa (lihat perenggan 31).

(3) Pemfailan rayuan bukanlah secara sendirinya menjadi keadaan-keadaan istimewa yang menghendaki penggantungan. Dalam kes semasa, jika penggantungan dibenarkan, ianya akan menyebabkan ketidakadilan yang nyata terhadap plaintif-plaintif kerana akan ada kelewatan lanjut sementara menunggu pendengaran rayuan di Mahkamah Rayuan. Maka, kesan penggantungan tidak hanya melanjutkan kes ini diselesaikan tetapi ia juga akan menyebabkan keresahan kepada plaintif-plaintif. Plaintif-plaintif berhak kepada jumlah penghakiman dan sebarang kelewatan dalam membayarnya akan memprejudiskan plaintif-plaintif yang telah bertahun menunggu unit kondominium mereka disiapkan dan gantirugi jumlah tertentu di bawah SPA (lihat perenggan 17 dan 32).

Notes

For a case on stay of execution pending appeal, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2386.

For a case on stay of execution, see 2(2) *Mallal's Digest* (4th Ed, 2004 Reissue) para 443.

Cases referred to

Australian Granodtorite Ltd v Devex Ltd [1991] NSW Lexis 9377 (refd)
Bridge v Campbell Discount Co Ltd [1962] AC 600, [1962] 1 All ER 385 (refd)
Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd [1933] AC 20 (refd)
Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda [1905] AC 6 (refd)
Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 (refd)
Farrant v Olmius (1820) 3 B & Aid 692 (refd)
Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application [1993] 3 MLJ 514 (refd)
Hiriram a/l Jayaram & Ors v Sentul Raya Sdn Bhd (No 2) [2003] 6 MLJ 564 (refd)
Intrinsic Pty Ltd v European Asian Bank [1987] NSW Lexis 7300 (refd)
Kemble v Farren (1829) 6 Bing 141 (refd)
Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257 (refd)
New Garage & Motor Co Ltd [1915] AC 79 (refd)
Public Works Comr v Hills [1906] AC 368 (refd)

Sainter v Ferguson (1849) 7 CB 716 (refd)
Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin [2000] 5 MLJ 391 (refd)
Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale [1967] 1 AC 361, [1966] 2 All ER 61 (refd)
Tropiland Sdn Bhd v DCB Bank Bhd & Ors [2000] 2 MLJ 65 (refd)
Wilson v Church (No 2) (1879) 12 Ch D 454 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 73
Housing Developers (Control and Licensing) Regulations 1982

NV Sree Harry (Sri Ram & Co) for the plaintiffs.
Sylvia Cotter (Logan Sabapathy & Co) for the defendant.

Abdul Malik Ishak J:

INTRODUCTION

[1] By way of a summons in chambers in encl 9, the defendant sought for the following orders:

(1) pursuant to s 73 of the Courts of Judicature Act 1964 and/or the inherent jurisdiction of this honourable court that the order of this court dated 4 January 2005 and the execution thereof be stayed:
   (a) pending the final disposal of the defendant's appeal to the Court of Appeal against the whole of the said order of this court; or
   (b) for such time as this honourable court shall so direct;
(2) such consequential and further and/or other orders and/or directions be made as this honourable court deems just in the circumstances; and
(3) costs of this application be provided for.

[2] Basically, encl 9 was the defendant's application for a stay of execution pending appeal to the Court of Appeal.

FACTS OF THE CASE

[3] In a nutshell, the facts may be stated as follows.

[4] The plaintiffs herein — all seven of them, are homebuyers who purchased condominium units from the defendant. The sale and purchase agreements between the parties were the standard sale and purchase agreements ('the SPAs') as found in Schedule 'H' of the Housing Developers (Control and Licensing) Regulations 1982. Now, under the SPAs, the defendant was to hand over

vacant possession of the condominium units and complete the common facilities within 36 months from the date of the SPAs. The defendant further agreed under the SPAs to pay the plaintiffs liquidated damages if the defendant failed to deliver and complete the common facilities within the 36 months time frame period. So, when the defendant failed to deliver and complete the common facilities of the condominium units within the 36 months time frame period, the plaintiffs filed the present originating summons seeking, *inter alia*, liquidated damages in accordance to the SPAs as reflected in encl 1.

[5] On 4 January 2005, my immediate predecessor after having deliberated the lengthy written submissions filed by the parties on both sides ordered, *inter alia*, that the defendant pays the plaintiffs liquidated damages as per the express terms and conditions of the SPAs (hereinafter referred to as 'the said Order').

[6] On 19 January 2005, the defendant filed an appeal to the Court of Appeal against the said order that was granted by my immediate predecessor.

[7] On 21 February 2005, the defendant filed the present summons in chambers in encl 9 for a stay of execution of the said order that was granted by my immediate predecessor.

[8] Of crucial importance is the fact that the defendant has always been aware of its liability to pay the plaintiff liquidated damages for its failure to deliver and complete the condominium units within time. Without a doubt, the defendant is a responsible developer and other developers in the country should emulate what the defendant is doing. It is a noble gesture aimed at fostering good relationship with the purchasers. It is evident, so far as the evidence is concerned, that the defendant has already made a provision of RM51.0 million as liquidated damages to be paid to the purchasers. Reference should be made to a newspaper article that appeared in 'The Star' on 6September 2001, annexed as exh 'A' to the plaintiffs' affidavit (No 3) affirmed by the first plaintiff by the name of Walter a/l Pathrose Gomez on 24 March 2005 as reflected in encl 10. The salient passage of 'The Star' newspaper reads as follows:

> Taiping Con had made provision for liquidated ascertained damages in relation to interest/penalty charges for late delivery of units since the project was suspended in 1997. In total, it provided RM29 million in 1999 and a further RM22 million in 2000.

[9] The defendant admitted that provisions in the sum of RM51.0 million were made to pay the liquidated damages. But according to the defendant, such provisions were made 'in accordance with prudent accounting practice and is in no way a recognition of liability on the part of the defendant' (see the defendant's affidavit (No 4) affirmed by Lee Kian Teck on 26 April 2005 as reflected in encl 11 at para 4 thereof).

[10] Such feeble explanation must be taken with a pinch of salt. If it is not in recognition of the defendant's liability, why should the defendant set aside the sum of RM51.0 million for liquidated damages for late delivery of the condominium units? And if that is not an admission of liability, I do not know what is. One would not make provision for a debt unless that debt is really in existence. One would also not make provision for a debt that would not stand the scrutiny of the court. In short, the defendant recognises that liquidated damages should be paid to the plaintiffs and all the other aggrieved purchasers and that is why the defendant has made that provision.

[11] I must categorically say that the parties to a contract, just like the present parties here, may agree that in the event of a breach, the party in default — referring to the present defendant, shall pay a stipulated sum of money to the other — referring to the plaintiffs here. If the sum payable is a genuine pre-estimate of the loss which is likely to flow from the breach (*Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79 (HL); *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6 (HL); *Public Works Comr v Hills* [1906] AC 368 (PC); and *Bridge v Campbell Discount Co Ltd* [1962] AC 600, [1962] 1 All ER 385 (HL), then it can be said to be the agreed damages and it is usually called 'liquidated damages', and it is capable of recovering and, in fact, it is recoverable without the necessity of proving the actual loss suffered (per Tindal CJ in *Kemble v Farren* [1829] 6 Bing 141 at p 148; and *New Garage & Motor Co Ltd* [1915] AC 79 at p 93 (HL) per Lord Parker). It is germane to mention that it is also open to the contracting parties to agree to a sum for the liquidated damages which is less than the probable loss (*Cellulose Acetate Silk Co Ltd v Widnes Foundry (1925) Ltd* [1933] AC 20 (HL); and *Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, [1966] 2 ALL ER 61, HL). The aggrieved party may recover the liquidated damages irrespective of his actual loss or the loss which he is able to prove. It must be borne in mind that any judgment for any other sum which is not the liquidated sum may be set aside (*Farrant v Olmius* (1820) 3 B & Aid 692).

[12] The 'build and sell' policy as proposed by the Government recently would certainly put an end to civil suits that sprout in our courts to the brim. Purchasers of houses developed by the developers would be able to get their houses without worrying as to late deliveries. Australia is a good example where the tebuild and sell' policy proves to be a success. But, for the moment, Malaysians must accept the fact that developers would not resort to 'build and sell' policy and Malaysians must be wary of unscrupulous developers. Be that as it may, the question of whether a sum stipulated for in the contract is a penalty or liquidated damages does not arise in this case. That question, if it is to be answered, has to be answered legally because it is according to *Sainter v Ferguson* (1849) 7 CB 716, at p 727 a question of law. Lord Dunedin in *Dunlop Pneumatic Tyre* was of the view that the parties to a contract who use the words

'penalty' or 'liquidated damages' may *prima facie* be supposed to mean what they say, yet, according to Lord Dunedin, the expression used was not conclusive. According to Lord Dunedin, the court must find out whether the payment stipulated was in truth a penalty or liquidated damages. Here, in my judgment, the liquidated damages is a genuine pre-estimate of the damage that the plaintiffs have incurred. That would certainly be the liquidated damages and they are recoverable.

THE CURRENT LAW ON STAY

[13] The law books are replete with authorities on the stay of execution pending an appeal. What I am about to say have been said elsewhere by me and by other judges before me.

[14] The court has an absolute and unfettered discretion as to granting or refusing a stay and it will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on an affidavit. The justice of the case on stay is usually arrived at by striking a judicious and equitable balance between the principle that the successful party in the litigation ought be allowed to reap the fruits of his litigation and not obtain a mere barren success, and the countervailing principle that should the unsuccessful party in litigation be ultimately successful in his appeal, he ought not be deprived of the fruits of his litigation due to the result of his appeal being rendered nugatory. Yet, it must always be borne in mind that a successful party in litigation has acquired a vested interest in the outcome of the case whereas the other party who appeals only has an interest contingent upon a successful outcome of his appeal. And, it is primarily for this reason and the implied caveat that the courts should discourage parties who lose their cases upon merits, from wrenching the fruits of litigation from the successful parties — by keeping the litigation alive through spurious appeals without any real prospect of success and simply in the hope of gaining some respite against immediate execution upon the judgment, that the courts have been and are only moved to grant such a stay upon a set of certain requirements which, for want of a more appropriate term, the courts have been driven to use, quite rightly, the oft-quoted expression 'special circumstances'. Now, the term 'special circumstances' is a term to denote a combination of certain determining factors that are usually demonstrated by affidavit evidence in order to persuade the court that it is a just and an appropriate case to grant a stay in the circumstances. It would not be out of place to say that the recent Federal Court case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 the stay of execution pending an appeal when Augustine Paul JCA (now FCJ) referred with approval a passage by Ian Chin JC (as he then was) in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514. This was what his Lordship said at p 266:

As Ian HC Chin JC (as he was then) said in *Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another application* [1993] 3 MLJ 514:

> An attempt was made to define special circumstances by Raja Azlan Shah (as His Majesty then was) in the case of *Leong Poh Shee v Ng Kat Chong* [1966] 1 MLJ 86, viz:
>
> > Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way feat which is usual or common.

[15] And later at p 267 of the report, his Lordship referred to another case and quoted it favourably when he said:

> In *Smith, Hogg & Co Ltd v The Black Sea and Baltic General Insurance Co Ltd* 162 LTR 11 Scott LJ said at p 12:
>
> > The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject-matter of the action or deprive the appellant of the means of prosecuting the appeal.

[16] Continuing at p 268 of the report, his Lordship aptly said:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words special circumstances is the genus of which nugatoriness is a species. If it has been shown that an appeal would be rendered nugatory if stay was refused what it means is that a special circumstance has been established. Thus they cannot be treated as separate heads and one cannot be an alternative to the other. Neither can one be accepted or rejected in favour of the other as they are inter-related. See *Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Anor* [1997] 2 CLJ 299 could have withstood scrutiny if it had merely referred to nugatoriness without rejecting special circumstances. As nugatoriness is a species of special circumstances a mere reference to it is sufficient to convey the correct legal impression. Any attempt to restrict the grant of a stay to nugatoriness, quite apart from its impropriety, will severely restrict the grounds on which an applicant may rely. Learned counsel for the applicants is therefore wrong in submitting that the nugatory approach is not a matter for consideration in this case as what is relevant is only the special circumstances. He would have been correct if he had said that he was not relying on nugatoriness but on some other species of special circumstances.

[17] It is now trite law that the court will not deprive the successful party of the fruits of his litigation unless the unsuccessful party can show special circumstances. To me, the plaintiffs here are entitled to the judgment sum and any delay in payment will cause prejudice to the plaintiffs who have waited for years for the completion of their condominium units and the liquidated ascertained damages pursuant to the SPAs.

THQ GROUNDS RELIED UPON BY THE DEFENDANT TO CONSTITUTE SPECIAL CIRCUMSTANCES

[18] The defendant itemised the special circumstances in this way:

(1) the plaintiffs would not be in a position to repay the judgment sums in the event the defendant's appeal is allowed;

(2) it is unlikely that the plaintiffs would be willing to return the judgment sums in the event the defendant is successful in its appeal;

(3) the plaintiffs are not of sound financial standing;

(4) the plaintiffs have not led evidence to show the extent to which the plaintiffs had financed this litigation; and

(5) in such circumstances, the defendant's success in its appeal would be merely illusionary.

[19] In a nutshell, what the defendant said was this. That, in the event the defendant succeeds at the Court of Appeal, the plaintiffs would not be in a position to repay the defendant due to their uncertain financial position. With respect, the defendant has failed to adduce any evidence in their affidavit to show the plaintiffs' alleged inability to pay.

[20] Out of deference to counsel on both sides, I will now say something about the so called 'plaintiffs' poverty'. I will begin by referring, once again, to the Federal Court case of Kosma Palm Oil particularly at pp 267 to 268 of the report and there Augustine Paul JCA (now FCJ) said:

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application (see *Syarikat Berpakat v Lim Kai Kok* [1983] I MLJ 406). Where it is alleged that there is a danger of the unsuccessful party not being repaid if its appeal is successful for any reason like, for instance, the insolvency of the other party, this must be shown in the affidavit (see *The Annot Lyle* (1886) 11 PD 114). This issue was dealt with articulately by Malik Ishak J in *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v Raja Zainal Abidin bin Raja Hussin & Anor* [1996] 2 CLJ 353 at p 356:
>
> > I venture to say that the applicant failed to establish by affidavit evidence that Raja Zainal Abidin is insolvent and therefore would not be in a position to reimburse RM25,892,000 and to pay damages in the event the applicant succeeds in her appeal. Unless evidence is adduced to the contrary, I must assume that Raja Zainal Abidin is not solvent and this assumption is clearly borned out by his affidavit in encl 45.

[21] Next, I would refer to the case of *Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391 where Mahadev Shankar J (as he then was) aptly said at p 396 of the report:

It is not enough to contend that the plaintiff is impecunious and therefore incapable of making reimbursement. Evidence has to be adduced to prove that it is so.

[22] Continuing at pp 397 to 398 of the report, his Lordship Mahadev Shankar J (as he then was) said:

In his affidavit, the defendant says the plaintiff is unemployed, does not own any property of any sufficient value and therefore the appeal will be nugatory. Other grounds urged are that she waited 41 years to make her claim and she would not be prejudiced if she waits a little longer.

The plaintiff's response is that although she is unemployed she is not a pauper. She avers that she has financed this litigation both in terms of legal expenses and valuation reports. She further avers that she did not at any time tell the defendant about her financial condition. She thus leaves it to be implied that the defendant's assertion that she does not own any property of value, is pure speculation. But she has not listed any of her assets. She also claims that if the defendant's claim is allowed, the result will be that the denial of justice which she has suffered all these years will be further perpetuated.

Charting a course between these contentious submissions, I would observe first of all that the onus of showing that the appeal will be nugatory unless the stay is granted is upon the defendant. It is not enough to say that the plaintiff is poor. It has also to be shown that if the money is paid over there is no reasonable probability of getting it back.

Can the court infer from her alleged poverty that the plaintiff is the kind of person who was predisposed to dissipating all her assets? This would indeed be the case if it was shown that she was a person of such intemperate habits, that she would immediately upon receipt of the cash put it beyond the reach of the defendant.

But at best what can be said here is that there is a risk that the plaintiff will spend the money on intangible assets or make some really bad investments. What worries me is that the law must be the same for everybody. The risk of dissipation is not confined to poor people. Indeed it could be demonstrably proved that people who are wealthy also embark upon disastrous financial ventures. A universal risk is not a special circumstance. A very real risk may be, depending on the facts of the case, but it has to be shown that there is something here which takes the matter out of what is ordinary. Otherwise, a stay of execution of a money judgment will be automatic in all cases where that money is in court.

On the other side of the scales is the concept of not depriving a successful party of the fruits of his litigation. The purpose of the court order is to put those fruits into the plaintiffs mouth. Who is the defendant whom the court has found liable, to say that she should not be allowed to chew them? Everything else being equal can we be so bold as to predict upon whom Dame Fortune will shower her favours with the passage of time? If the plaintiff invests her money wisely or even if she is just lucky she could even increase her wealth in the next few years.

> The advanced age of the plaintiff is just as good a reason for putting her in funds immediately. What use is her victory to her personally after she becomes infirm or has passed on? Indeed if this matter ends up in the Federal Court, a tune frame of another three to four years for the final disposal of this case may not be unrealistic. The plaintiff may not be as rich as the defendant today. Indeed the plaintiffs counsel has blamed the defendant for her present financial status. But the point is that on the evidence as it has been presented, the court is in no position to say that in two or four years time the plaintiff will be worthless, even if it will be difficult to say how much she will then be worth.

[23] I gratefully adopt the speech of Mahadev Shankar J (as he then was) to the facts of the present case and indeed even the Federal Court in *Kosma Palm Oil* referred to with approval the case of *Sarwari* in its judgment.

[24] Now, having being appraised of the established and entrenched legal principles it is crystal clear that it is for the defendant in the stay application to prove by way of affidavit evidence of the plaintiffs' poverty in that the payment of the judgment sums would destroy the substratum of the appeal. I must cautiously proceed to examine whether the defendant has successfully discharged its burden of proving that the payment of the judgment sums to the plaintiffs would destroy the substratum of the appeal. For this exercise, I would refer to the defendant's affidavit (No 4) affirmed by Lee Kim Teck on 26 April 2005 as seen in encl 11 particularly at para 5(b) thereto which averred that:

> there is no evidence of the extent to which the plaintiffs had financed this litigation.

[25] I must categorically say that the defendant's assertion on the plaintiffs' so called 'poverty' was a one liner assertion and a bare averment unsupported by any evidence. It was purely speculative because the defendant makes reference to the poverty point only at that para 5(b) of encl 11. There was no evidence, at all, that the plaintiffs are insolvent and are not in a position to reimburse the liquidated and ascertained damages in the event the defendant succeeds in the appeal in the Court of Appeal. Thus, if a stay was allowed as sought for by the defendant it would send a wrong signal to those parties who lost their cases upon the merits by wrenching the fruits of litigation from the successful parties by adopting dubious methods of keeping the litigation alive through spurious appeals without any real prospect of success and simply in the hope of gaining some respite against immediate execution on the judgment. It has become fashionable to make an assertion, without affidavit evidence, that the successful party would not be in a position to reimburse the judgment sum. The court would certainly decline to accept assertions from the bar without support from affidavit evidence. In any event, in the context of the present case, the defendant's fear of the plaintiffs' financial position was entirely unfounded for the following reasons:

(1) that the plaintiffs herein have financed this litigation themselves and this piece of evidence can be found in para 4 of the plaintiffs' affidavit (No 4) that was affirmed by Elizabeth Verghis on 28 April 2005 as seen in encl 12;

(2) that the plaintiffs' herein have been servicing their loans ever since the purchase of the condominium units as set out in para 5.8(iii) of the plaintiffs' affidavit (No 3) that was affirmed by the first plaintiff on 24 March 2005 as seen in encl 10;

(3) that the first plaintiff is a veterinary doctor by profession (see para 5.8(iv) of the plaintiffs' affidavit (No 3) affirmed by the first plaintiff on 24 March 2005 as seen in encl 10 as well as the first plaintiffs recent Form J in exh 'B' annexed to encl 10);

(4) that the second plaintiff is an entrepreneur (see the averment at para 5.8(iv)(a) of the plaintiffs' affidavit (No:3) that was affirmed by the first plaintiff on 24 March 2005 as seen in encl 10);

(5) that the fourth plaintiff is the managing director of KS Ser Enterprise (see the averment at para 5.8(iv)(b) of the plaintiffs' affidavit (No 3) affirmed by the first plaintiff on 24 March 2005 as seen in encl 10 as well as the fourth plaintiffs recent Form J in exh 'B' annexed to encl 10);

(6) that the fifth plaintiff is a manager with the risk management and compliance department of Berjaya General Insurance Bhd (see the averment at para 5.8(iv)(c) of the plaintiffs' affidavit (No 3) that was affirmed by the first plaintiff on 24 March 2005 as seen in encl 10 and the fifth plaintiff's recent Form J in exh 'B' annexed to encl 10); again in exh 'B' annexed to encl 10 it showed that the fifth and the sixth plaintiffs jointly owned 120 lots of Berjaya Sports Toto Bhd shares, 12 lots of Rekapacific Berhad shares, one lot of Sri Hartamas Berhad shares and 19 lots of Berjaya Capital Berhad shares; and

(7) that the seventh plaintiff is the confidential secretary with Concorde Hotel, Kuala Lumpur (see para 5.8 (iv)(d) of the plaintiffs' affidavit (No 30) affirmed by the first plaintiff on 24 March 2005 as seen in encl 10 as well as the seventh plaintiff's bank statements in exh 'B' annexed to encl 10 thereto).

[26] For the sake of expediency, it must be borne in mind that the second and the third plaintiffs are the joint owners of the unit which they bought. Likewise, the fifth and the sixth plaintiffs too are the joint owners of the unit which they bought.

[27] It must also be borne in mind that the amount of the liquidated and ascertained damages payable by the defendant to each of the plaintiffs under the said order that was granted by my immediate predecessor ranges from the sum of RM71,250.31 to RM139,683.50 only.

[28] It cannot be denied that the amount of the liquidated and ascertained damages payable by the defendant to each of the plaintiffs is not a big sum.

In the circumstances and given the plaintiffs' financial standing as set out above, I must say that even if the defendant's appeal to the Court of Appeal is allowed and each of the plaintiffs is ordered to refund the liquidated and ascertained damages, the plaintiffs could readily refund those sums. Indeed the learned counsel for the plaintiffs in the person of Mr NV Sree Harry emphasised that the refund could easily be met by the plaintiffs and I have no reason to doubt him. That being the case, the defendant's fear was totally and entirely unfounded.

[29] Next, it was argued that the defendant's appeal to the Court of Appeal would be rendered nugatory in that the status quo may be irreversible in the event its appeal to the Court of Appeal is allowed because the financial position of the plaintiffs are unknown. In support of this proposition the defendant relied heavily on the case of *Wilson v Church (No 2)* (1879) 12 Ch D 454. But, with respect, that case can easily be distinquished and I have distinguished it in *Hiriram a/l Jayaram & Ors v Sentul Raya Sdn Bhd (No 2)* [2003] 6 MLJ 564 at pp 574 and 575 in this way:

> I have this to say of the case of *Wilson v Church (No 2)*. That case can readily be distinguished. That case cannot be applied to the facts of our case. In that case, the Court of Appeal there was faced with a different situation. There if the stay pending appeal was not granted it would have been very difficult to recover the money because the money was to be distributed among 900 to 1000 persons who were not the actual parties to the suit and therefore it would be very difficult to reach them for the purpose of getting back the money in the event the appeal was allowed. At p 458 of the report, Cotton LJ writing a separate judgment remarked:
>
> > Acting on the same principle, I am of the opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of the opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of the opinion that it ought not to be divided amongst the bondholders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund.
>
> In sharp contrast would be the present case before me. There are only 14 active plaintiffs as opposed to the 900 to 1000 persons in *Wilson v Church (No 2)*. All these 14 active plaintiffs are parties to the suit and their particulars are well within the defendant's knowledge as opposed to the 900 to 1000 persons who were not parties to the action in *Wilson*. At any rate, to take the extreme case, it can be said that the risk of a plaintiff dissipating the money is a universal risk regardless of whether the plaintiff was rich or poor and being a universal risk it cannot be considered special circumstances (*Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391).

[30] Here, there are only seven plaintiffs who have purchased the condominium units from the defendant and these plaintiffs can easily be traced as compared to the numerous bondholders who were unidentified in the case of *Wilson v Church (No 2)*. Furthermore, the present plaintiffs hold good positions from a wide range of fields as alluded to earlier and they have financed this litigation and are defending the appeal at the Court of Appeal. All these would show that the defendant's assertion of the difficulty in recovering the liquidated and ascertained damages was nothing more than a mere speculation. It must be borne in mind that the defendant's liability to pay out the liquidated and ascertained damages is a natural consequence of the defendant's failure to deliver vacant possession of the condominium units. In fact, the defendant has always been aware of its liability to pay the plaintiffs' liquidated and ascertained damages by virtue of the fact that the defendant had already made provision of RM51 million to pay the liquidated and ascertained damages arising from the defendant's failure to deliver vacant possession of the condominium units to all those purchasers.

[31] It has been said before and I must say it again that special circumstances must be special under the circumstances as distinguished from ordinary circumstances. What is exceptional must constitute special and what is special would surely be caught under the special circumstances requirement. It cannot be something that is usual or common. Thus, the risk that the plaintiffs may not be able to repay the defendant the sum set-off is common or usual. It is not special. It is not distinctive or out of the way and therefore it does not constitute special circumstances. I was, to say the least, not persuaded, at all, to grant the stay of execution pending the appeal to the Court of Appeal.

A STAY WOULD FURTHER PERPETUATE THE PLAINTIFFS' SUFFERING ALL THESE YEARS

[32] The plaintiffs herein purchased five condominium units. They signed the sale and purchase agreements between October 1995 and January 1997. The defendant was supposed to have delivered vacant possession of the condominium units between October 1998 and January 2000. But, unfortunately, the defendant failed to do so. The plaintiffs have waited since 1998 to move into their homes — their condominium units. In the interim period, they have been made to suffer unnecessarily by servicing their interest on their loans with the banks for the delayed period without the benefit of moving into their dream homes. Finally, on 4 January 2005 the parties appeared before my immediate predecessor wherein the plaintiffs obtained an order allowing the plaintiffs' claim for liquidated and ascertained damages as compensation for their suffering. Essentially in filing the present application for a stay as seen in encl 9, the stand of the defendant was that it had filed an appeal to the Court of Appeal. But I say that filing an appeal does not in itself constitute special circumstances so as to warrant a stay. In my judgment, to

grant the stay will cause manifest injustice to the plaintiffs as there will be further delay of at least two to three years while waiting for the hearing of the appeal at the Court of Appeal. According to the plaintiffs, the defendant's appeal to the Court of Appeal would fail. That is something which I would not comment upon. Everything now rests with the Court of Appeal. But one thing certain is this. That ultimately after the passage of many wasted months or even years, the appeal would be heard by the Court of Appeal and if the stay is granted by me the plaintiffs would be deprived of enjoying the fruits of their litigation. Simply put, the effect of the stay would not only prolong the disposal of the case but it would also cause anguish to the plaintiffs. When viewed in this perspective it would not be difficult to see where the justice of the case lies.

STAY ON TERMS

[33] The defendant has submitted that there is no prejudice to the plaintiffs for this court to grant a stay and that any prejudice, if any, can be easily offset by granting a stay on terms. With respect, submissions along these lines cannot be accepted by this court. In the first place, the defendant must prove special circumstances before it can be entitled to a stay regardless of whether the stay is conditional or not. The issue of a conditional stay does not arise at all.

[34] The defendant relied on two authorities, namely:

(1) *Intrinsic Pty Ltd v European Asian Bank* [1987] NSW Lexis 7300, unreported decision dated 16 February 1987; and

(2) *Australian Granodtorite Ltd v Devex Ltd* [1991] NSW Lexis 9377, unreported decision dated 18 July 1991.

where the Australian courts granted stays on terms. Both these two cases were decided by Kirby P. In *Intrinsic*, Kirby P said:

> In these circumstances, it appears appropriate to protect the appellant's right to appeal. However, the opponent must also be protected. This can be achieved by proposing a number of stringent conditions, which it must be understood should be faithfully complied with by the claimants.'

[35] In *Australian Granodiorite*, Kirby P said:

> They evidence, in my view, a growing inclination of the courts in recent years to provide stays defensive of the right of the party to exercise the facility of appeal which Parliament has provided. Such stays must, however be ordered upon terms which are just to the party which has been successful in the court below.

[36] But both these two cases are clearly distinguishable from the facts of our present case. In these two cases, the courts held that the defendants were entitled to the stays and only then the courts proceeded to impose conditions in regard to the stays. Here, with respect, the defendant has not shown any

special circumstances entitling the defendant to a stay, conditional or otherwise.

[37] I will now revert back to the case of *Intrinsic* and I have this to say. In our jurisdiction, merits of an appeal is not a consideration for granting a stay pending an appeal whereas in Australia where *Intrinsic* was decided (decision of the Supreme Court of New South Wales, Court of Appeal with a coram of Kirby P, Mahoney & McHugh JJA), it is a consideration. Thus, in *Intrinsic* the Court of Appeal after having formed an opinion that the appeal was not a spurious one, granted the conditional stay. Factually speaking, the facts in Intrinsic are poles apart from the present case in that:

(1) in *Intrinsic*, the application for a stay pending an appeal was made to the Court of Appeal whereupon a conditional stay was granted on the following terms:

(a) that the applicant proceed diligently and do all necessary things so that the appeal is ready for hearing by filing the index to the record of appeal within seven days and thereafter to file the record of appeal; and

(b) the applicant does not incur liability in total sum of $10,000 or dispose of assets in total sum of $10,000 without the prior approval of the respondent or further order of the Court of Appeal or pending the hearing of the appeal.

(2) the Court of Appeal ordered that the appeal be listed before the Registrar and a hearing date to be fixed in April 1987 (if possible) — some 1 1/2 months thereafter.

[38] Now, in the present case and at my level, I am in no position to give directions to the conduct of the appeal in the Court of Appeal including fixing the date of the appeal before the Registrar of the Court of Appeal for him to fix the appeal proper before the full coram of the Court of Appeal in 1 1/2 months' time. This kind of impediment makes the case of Intrinsic miles apart from our case.

CONCLUSION

[39] By way of encl 9, the defendant sought for a stay against a monetary judgment. I cannot see how the defendant's appeal would be rendered nugatory if the defendant were to succeed in its appeal bearing in mind that it involved a stay of a monetary judgment. In the event the plaintiffs were to lose the appeal in the Court of Appeal, then the defendant could easily recover from the plaintiffs what they have lost because the damages could easily be quantifiable and therefore recoverable (*Tropiland Sdn Bhd v DCB Bank Bhd & Ors* [2000] 2 MLJ 65).

A **[40]** For the reasons as adumbrated above, I refused the stay and, accordingly, I dismissed the defendant's application in encl 9 with costs.

Defendant's application dismissed with costs.

Reported by Izzaty Izzuddin

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